

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

SNE ENTERPRISES, INC. ^{1/}

Employer

and

Case 9-RC-17883

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

I. INTRODUCTION

The Employer is engaged in the manufacture and sale of windows and doors at its Huntington, West Virginia facility, the only facility involved in this proceeding. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's employees at this facility. The parties agree that the unit appropriately consists of all production and maintenance employees employed by the Employer at its 750 West 10th Avenue, Huntington, West Virginia facility, but excluding temporary employees, leased employees, sales and marketing employees, engineers, confidential employees, salaried employees, office clerical employees, and all professional employees, guards and supervisors as defined in the Act (the Unit). There is no history of collective bargaining affecting the employees involved in this proceeding.

The only issue on which the parties disagree is whether the "lead persons" should be excluded from the Unit. The Employer, contrary to the Petitioner, contends that the lead persons are supervisors within the meaning of Section 2(11) of the Act because they effectively recommend employees for hire, they assign employees and responsibly direct their work, and because they possess certain secondary indicia of supervisory status, and therefore must be excluded. A hearing officer of the Board held a hearing on this issue on March 5, 2004. Following the hearing, the Employer filed a brief with me which I have carefully considered. On March 31, 2004, I issued an Order Remanding Proceeding and Reopening the Record, pursuant to which a further hearing was conducted on April 6, 2004. Thereafter, both parties filed briefs which I have carefully considered in reaching my decision.

^{1/} The Employer's name appears as amended at hearing.

I have carefully considered the evidence and the arguments presented by the parties and have concluded, as discussed below, that the lead persons are indeed supervisors within the meaning of the Act. Accordingly, I have directed an election in a unit excluding the lead persons.

An overview of the Employer's operations provides the context for my discussion of the issue of the supervisory status of the lead persons. I will then present, in detail, the facts and reasoning that supports my conclusions.

II. OVERVIEW OF OPERATIONS

The Employer manufactures windows and doors at its facility located in Huntington, West Virginia. The plant has been in operation for 6 to 7 years. The facility covers an area of approximately 500,000 square feet. There are approximately 180 employees employed in the unit that I have found to be appropriate for the purposes of collective bargaining.

Customer demand for the windows and doors produced at the facility is seasonal, and production levels fluctuate accordingly. During the slow season, which runs from approximately Thanksgiving until about the end of February, there are approximately 280 to 290 employees at the plant. This number includes nonunit salaried employees, production employees and temporary or leased employees. During peak production periods, the Employer increases its employee complement to as many as 520 employees. The Employer obtains the additional employees from an employee leasing company, Adecco. Currently, there are approximately 60 to 70 employees at the plant that are employed by Adecco. This number may swell to as many as 300 during peak production periods. Neither party seeks to include these employees.

The Employer's production facility has eight departments: assembly, glass, screen, specials, materials, shipping, quality, and maintenance. The assembly department has five distinct areas: (1) the pro-craft line, (2) vinyl-crest line, (3) casement line, (4) patio door line, and (5) bows and bays. The glass department produces IGU (integrated glass units) units. The screen department produces the screens for the windows. The specials department makes architectural types of windows such as rounds, half rounds, and octagons. The materials department moves raw materials to and from the various production lines. The shipping department loads the completed product onto trucks for delivery. The quality department is responsible for assuring the quality of incoming, in process, and completed product. The maintenance department is a support group responsible for machine setups and repairs.

The plant is currently operating two production shifts: "first shift" is from 7:00 a.m. to 3:00 p.m. and "third shift" is from 11:00 p.m. to 7:00 a.m. The maintenance department also currently operates a "second shift" from 3:00 p.m. to 11:00 p.m. During peak production periods, the plant may also run a "second shift" in certain production departments.

The plant manager, Jim George, directs the operation of the entire facility. George occupies an office at the plant; other offices at the plant are occupied by a human resources director, a safety director, an administrative assistant, a planner/purchaser, a master scheduler, and another administrative assistant. Reporting to George are ten

department/production supervisors, seven on the first shift and three on the third shift. The supervisors and the plant manager are salaried, while lead persons and all other production and maintenance employees are hourly paid. Each supervisor directs the operation of a particular department or area on a particular shift.

Reporting to the ten department/production supervisors are 21 lead persons. Some of the department/production supervisors, such as those in the materials, shipping and maintenance departments, have only one lead person reporting to them along with 8 to 12 other hourly employees. Another department/production supervisor has 4 lead persons and approximately 53 hourly employees reporting to him. The remaining department/production supervisors have 2 or 3 lead persons, and from 17 to 49 other hourly employees reporting to them.

As previously noted, lead persons are hourly paid. The lowest paid lead person earns about 20 cents per hour more than the highest paid production employee, but is eligible to progress to a wage rate that is about \$2.00 higher than the highest paid unit employees. Lead persons receive the same fringe benefits as unit employees.

Production lines, made up of in excess of 20 employees, are set up with individual workstations to which employees are assigned. Production jobs include assembly, machine operators and material handlers. Material handler and machine operator positions are bid positions, and require up to 5 days training to become proficient. Assembly positions can be learned in a few hours. For the most part, employees perform their pre-assigned jobs at their workstations. Lead persons assign new employees to their initial positions on the line. There are no guidelines for this initial assignment, and lead persons exercise their own judgment when determining where to place new employees. In addition, lead persons reassign employees whenever necessary due to absenteeism, which apparently affects most lines on almost a daily basis. Once again, there are no objective criteria for these reassignments and lead persons must rely upon their own judgment, based on their knowledge of the employees and of the skills required to perform a certain job function. Lead persons also reassign employees when necessary to maintain the smooth flow of work on the line, or in order to meet a production schedule. These reassignments may include the redirection of assembly and machine operators into non-bid positions.

Lead persons are held responsible by the Employer for the performance of the line with respect both to quality and productivity. Lead persons are expected to achieve the production schedule through the reassignment of employees on the line on an as-needed basis. There are no objective criteria for these reassignments and lead persons must rely upon their own judgment in order to keep the production flowing smoothly. Lead persons are evaluated based on the performance of their line, and are subject to demotion, which has occurred on occasions, if their line is not meeting production goals.

Lead persons are responsible for the training and cross training of the employees on their line. There are no set guidelines for this training and cross training, and lead persons exercise their own judgment when determining which employees to train on which jobs. Lead persons are also responsible for quality and safety on the line. Lead persons may counsel an employee

having a performance or safety problem with the goal of resolving that issue. If the employee does not respond to the verbal counseling from the lead person, the lead person would report the issue to a supervisor. It is undisputed that lead persons may not administer written discipline without the involvement of a supervisor. Lead persons are expected constantly to monitor the employees on the line, and may stop production if it appears necessary for safety reasons or to assure product quality. On at least one occasion, a lead person, on his own initiative, sent his entire production line home when his line was experiencing mechanical difficulties. Lead persons have also done performance evaluations for employees or have provided supervisors with input concerning the employees who work on their line when supervisors were completing performance evaluations.

Upon being hired, employees are instructed by managers and supervisors to follow the directions of the lead persons. If an employee fails to follow a lead person's direction, the lead person may give the employee a verbal counseling; if the employee does not respond, the lead person would report the employee to a supervisor for formal disciplinary action. Although lead persons may not give written discipline without a supervisor's approval, they have recommended that employees be disciplined, and it appears that these recommendations have been acted upon without any further or independent investigation.

III. THE LAW AND ITS APPLICATION

Before examining the specific duties and authority of the lead persons, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be

probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the lead persons possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” are not to deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

As I have previously noted, the Employer contends that the lead persons effectively make recommendations for hiring; they assign employees and responsibly direct the work force, as well as possess other secondary indicia of supervisory status. There is no contention that the lead persons have the independent authority to discipline or discharge employees or possess any other indicia of supervisory authority. I find, as detailed below, that lead persons use independent judgment in assigning and responsibly directing employees within the meaning of the Act. Accordingly, as the possession of any one of the specific criteria listed is sufficient for a finding of supervisory status, I find it unnecessary to address in detail the other criteria asserted by the Employer to be indicative of supervisory status.

Assignment and Direction of Work:

In determining whether individuals possess true supervisory indicia, utilizing independent judgment, the Board looks to established constraints or guidelines under which the individuals work and the accountability of the individuals whose supervisory status is in dispute. *Providence Hospital*, 320 NLRB 717 (1996).

When an individual has been delegated substantial authority to ensure that a work unit achieves management's objectives, he is thus "in charge." Where an individual placed "in charge" of exceedingly important quality control functions, and was responsible for training, assignment, and direction of other employees, she responsibly directed them. *B & B Insulation, Inc.*, 272 NLRB 1215, 1219 (1984). Individual who was "in charge" during second shift and exercised independent judgment was found to be a supervisor. *Chem Fab Corp.*, 257 NLRB 996, 998 (1981), *enfd.* 691 F.2d 1292 (8th Cir. 1982). An individual is in charge where the individual in question has sole or significant authority over the work unit and is not closely overseen by superior(s).

Individuals with "significant authority" for workers in a facility can also be "in charge," even though there are other supervisors and managers in the facility at the time. See *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 351-352, 353-354 (1st Cir. 1980) (highest authority on each shift was plant shift superintendent; shift operating supervisors who reported directly to that superintendent were also supervisors because they had the authority to "run the shift"). The significance of the availability of superiors by telephone or other means is tempered by the individual in question's discretion to contact the supervisor. Where the individual has discretion over whether to call a superior (as opposed to being required to call in particular circumstances), he or she is more likely to be in charge and, therefore, a supervisor. *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 244 (6th Cir. 1976) (notification of supervisors did not remove system supervisors' discretion in emergencies).

The record discloses that lead persons are responsible for making work assignments and giving directions that are not merely routine but require the use of independent judgment. See *Kentucky River Community Care, Inc.*, *supra*. The lead persons constantly monitor employees on the line and are responsible for the independent assignment of employees to ensure that production quotas are being met. Lead persons hold daily meetings to discuss production at the beginning of the shift and prior to resuming work after the scheduled lunch break. Lead persons also assign new employee to their initial position and are responsible for the training and the cross training of employees. Employees are expected to follow any direction from the leads and are subject to discipline for failure to do so. In performing these tasks, the lead persons use their judgment, unconstrained by any standing orders from higher-level management. See, e.g., *McClatchy Newspapers, Inc.*, 307 NLRB 773, 779 (1992); *Rose Metal Products, Inc.*, 289 NLRB 1153 (1988).

The Employer holds each lead person responsible for the productivity of his or her line. Lead persons are subject to demotion if the line fails to meet its production goals. The record includes two examples of lead persons, who were removed from their positions when the lines to which they were assigned failed to meet production goals. It is ultimately up to the lead person

to determine how to utilize the employees on the line to meet production goals. Failure to utilize the employees on the line in a manner that yields the appropriate level of productivity can result in the demotion of the lead person. From the uncontradicted testimony of the lead persons, it is evident that they are held responsible for the work performed by the regular hourly employees working on their lines and, thus, are in charge.

Other Indicia:

Although the Employer asserts that lead persons can effectively recommend the hire of new employees, the record does not support such a finding of supervisory status on this basis; see *Wake Electric Membership Corp.*, 338 NLRB No. 32 (2002). In addition, even though the record reveals that lead persons perform evaluations for unit employees, there is no evidence that the evaluations have had any impact on employees' pay or any other benefit. See *Beverly Enterprises, Alabama, Inc. d/b/a Riverchase Health Center*, 304 NLRB 861 (1991).

The Petitioner concededly argues in its brief that the work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments. *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). However, unlike the leadman in *S.D.I. Operating Partners*, where the Board found his assignments to be routine, with no real managerial discretion, as I have discussed earlier, the lead persons here do much more than make work assignments to equalize employees' work on a rotational or other rational basis. Thus, the lead persons here exercise independent judgment in assigning and redirecting the work in order to meet production goals, and are held accountable for those decisions.

IV. CONCLUSION

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the Employer has met its burden of establishing that the lead persons are statutory supervisors. Thus, they have the authority in the interest of the Employer to assign and responsibly direct work using independent judgment. Accordingly, I conclude that lead persons including Kim Wilson, Chad Edwards, Jeff Eaches, Terry Barker, Henry Withrow, Kevin Russell, Rich Koven, Dorothy Cochran, Ruth Atkins, Bobby Murrell, Joe McCoy, Mike Edmonds, Casey Cyrus, Jamie Houck, Jason Porter, Andy Robinson, Mike Reynolds, Jamie Carter and Ernest Burton are supervisors within the meaning of Section 2(11) of the Act. Therefore, I have excluded them from the unit found appropriate. ^{2/}

V. EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of the Act: Jim George, plant manager; and Department/Production supervisors, Brian Beckett, Mike Fisher, Chad Angel, Jon Suttles, Jack Ward, Janice Cremeans, Bryan Roy, David Willis, Doug Wooten, Jerry Sowards, and Frank Migyanka. Accordingly, I will exclude them from the unit.

^{2/} The record reflects that effective March 8, 2004, lead person Cheryl Harbour transferred from her lead person position to a bargaining unit position. Accordingly, I will include her in the unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its 750 West 10th Avenue, Huntington, West Virginia facility, but excluding temporary employees, leased employees, sales and marketing employees, engineers, confidential employees, salaried employees, office clerical employees, and all professional employees, guards, the lead persons and all other supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Steelworkers of America, AFL-CIO-CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **April 28, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **May 5, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 21st day of April 2004.

/s/ Earl L. Ledford

Earl L. Ledford, Acting Regional Director
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Classification Index

177-8520-0800
177-8520-2400
177-8520-3200
177-8520-4700
177-8520-5500
177-8520-5800
177-8520-6200
177-8520-7000